SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-393

A. HENRY TAGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOSEPH P. JENKINS, P. C.
West Park Center
Estes Park, Colorado 80517
Telephone: (303) 586-2496

WASH H. BROWN
Brotherhood Building
Kansas City, Kansas 66101
Telephone: (913) 321-7100

THOMAS W. TIERNEY
2700 Commerce Tower
Kansas City, Missouri 64105
Telephone: (816) 474-9767

Attorneys for Petitioner

R. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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SUPPLEMENTAL STATEMENT

Pursuant to Rule 24 (5) of the Rules of the Supreme Court of the United States, petitioner respectfully submits the within Supplemental Brief calling the Court's attention to intervening matter not available to him in sufficient time prior to the filing of his Petition for Certiorari to permit inclusion or adequate treatment therein. As stated at Point E of the Addendum to the Petition heretofore filed, said matter was belatedly discovered by independent counsel subsequent to the denial of petitioner's petition for rehearing in the Tenth Circuit Court of Appeals, and concerns highly inflammatory summaries offered and received at trial which did not conform to the government's evidence.

Petitioner respectfully submits that the highly inflammatory and prejudicial nature of the subject summary evidence raises a serious additional question to be presented for review, and for the reasons herein stated, requires reversal of the convictions herein pursuant to Rule 52 (b) of the Federal Rules of Criminal Procedure.

ADDITIONAL QUESTION PRESENTED BY INTERVENING MATTER

E. WHETHER THE DENIAL OF PETITIONER'S MOTION FOR SUMMARY REVERSAL PURSUANT TO 18 U.S.C., FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 52 (b) BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND SAID COURT'S DECISION AFFIRMING PETITIONER'S CONVICTIONS BELOW, IN LIGHT OF THE ADMISSION OF GOVERNMENT EXHIBIT NO. 154 IN EVIDENCE, CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT AND DECISIONS OF VARIOUS OF THE COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF 18 U.S.C., FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 52 (b), AND THE DUTY IMPOSED UPON THE COURTS BY SAID RULE; WHETHER SUCH ACTIONS CONSTITUTE SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND A SANCTION OF SUCH A DEPARTURE BY THE TRIAL COURT AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION; AND WHETHER PETITIONER WAS SO PREJUDICED BY THE ADMISSION OF SAID EXHIBIT AS TO REQUIRE REVERSAL OF HIS CONVICTION UNDER BOTH TRIAL COUNTS II AND III.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, Federal Rules of Criminal Procedure:

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

United States Code, Title 18:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

United States Code, Title 26:

§ 7206 (1) Fraud and false statements-declarations under penalties of perjury

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.

ADDITIONAL REASON FOR GRANTING THE WRIT PRESENTED BY INTERVENING MATTER

E. THE DENIAL OF PETITIONER'S MOTION FOR SUMMARY REVERSAL PURSUANT TO 18 U.S.C., FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 52 (b) BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND SAID COURT'S DECISION AFFIRMING PETITIONER'S CONVICTIONS BELOW, IN LIGHT OF THE ADMISSION OF GOVERNMENT EXHIBIT No. 154 IN EVIDENCE, CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT AND DECISIONS OF VARIOUS OF THE COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF 18 U.S.C., FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 52 (b), AND THE DUTY IMPOSED UPON THE COURTS BY SAID RULE; SUCH ACTIONS CONSTITUTE SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND A SANCTION OF SUCH A DEPARTURE BY THE TRIAL COURT, AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION; AND PETITIONER WAS SO PREJUDICED BY THE ADMISSION

OF SAID EXHIBIT AS TO REQUIRE REVERSAL OF HIS CONVICTION UNDER BOTH TRIAL COUNTS II AND III.

Petitioner in these proceedings stands convicted under two counts of a three-count indictment, Trial Count II charging the subscribing and filing of a false United States Income Tax Return for the calendar year 1964, in violation of 26 U.S.C., § 7206 (1), and Trial Count III charging violation of 18 U.S.C., § 371, in that from on or about the first day of January, 1962, and continuously thereafter up to June 16, 1971, petitioner and an unindicted co-conspirator did unlawfully, knowingly and willingly conspire with each other and with other unknown persons to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes. Among other things, it was charged that petitioner and the unindicted co-conspirator agreed and conspired to file United States tax returns which were false and fraudulent with reference to the sale of securities, and that such returns were in fact filed; that they would buy and sell securities in the names of certain corporations, the petitioner and their law partnership, buying in one name and selling in another so as to make the transactions difficult to trace; and that they would not make available adequate records to the Internal Revenue Service, and did not make such records available.

At the trial, a summary exhibit, Government Exhibit No. 154, was offered and received in evidence, over objection, after testimony by the revenue agent who had prepared it that it represented an accurate summary of exhibits that had theretofore been admitted in evidence. Its ostensible purpose was to summarize properly received

evidence relating to alleged unreported securities transactions by petitioner. It was a pencil schedule which was obviously prepared before trial, and included a great number of summarized transactions which were never received in evidence. Rather than prepare a new schedule for introduction, reflecting only a summary of those items which had actually been received, the government apparently merely erased those items which had not been properly received. However, to the great prejudice of defendant, this erasure was of such poor quality that the entire schedule was wholly readable. The schedule, as received, contained at least 15 summaries of evidence which was never properly received, and which aggregate in excess of $596,000 in allegedly unreported security transactions attributable to petitioner. A listing of the wholly readable summaries included in the exhibit, which are unsupported by any evidence received at trial, is set forth in schedule form, appearing at page 1 of the Appendix hereto.

The petitioner herein stood charged, and was subsequently convicted of two offenses, one involving the filing of a false income tax return, and the other involving an alleged conspiracy involving the purchase and sale of securities in the names of various entities in such a way as to make the transactions difficult to identify. It is almost impossible to perceive that the jury would not attach great significance to these wrongfully summarized and unsupported transactions totalling more than $596,000 in reaching its decision on *both* findings of guilt. A goodly number of the summarized but unsupported transactions allegedly occurred during the year in which the petitioner was charged with filing a false return. All purportedly occurred during the existence of the alleged conspiracy. Petitioner respectfully submits that the placing of such suggestions before the jury in summary form, without a shred of evidence in the record proper to support them,

is enough in and of itself to give rise in the minds of the jury to an almost irresistible impulse to suspect the propriety of all of appellant's motives and actions in the making and filing of his return for 1964, and to create a like impulse of suspicion and guilt when considering the existence or non-existence of the alleged conspiracy. It carries with it the unmistakable yet wholly unsupported inference of wrongdoing on the part of an accused at a time when he is charged with making a false return and of engaging in a conspiracy; and unsupported by record evidence, is so prejudicial to the rights of the accused as to leave no doubt of its adverse influence upon the jury.

Wright, Federal Practice and Procedure: Criminal Section 856, suggests that 18 U.S.C., Federal Rules of Criminal Procedure, Rule 52 (b) is ordinarily invoked by counsel who, in preparing an appeal, discovers what he considers to be an error to which no objection was theretofore taken (*suggesting likewise however that the rule is not so limited, and may be invoked by an appellate court on its own motion, even if it was never raised by counsel*). Such was the case in the instant proceedings. The highly inflammatory and prejudicial form in which the government's aforementioned summary exhibit was received in evidence was discovered by independent counsel employed to thoroughly examine the record on appeal subsequent to the denial of petitioner's petition for rehearing by the Tenth Circuit Court of Appeals. The discovery came too late for inclusion or adequate treatment in petitioner's Petition for Certiorari herein, but was raised by Motion for Summary Reversal filed in the Tenth Circuit on August 16, 1973, and denied by said court on August 23, 1973. Said Motion sought the invocation by the court of appeals of the so-called "plain-error" rule afforded it by Rule 52 (b) providing that plain errors or defects affecting

substantial rights may be noticed by an appellate court, although not previously brought to its attention. Said rule is a restatement of prior law, as set forth in *U. S.* v. *Atkinson*, 297 U.S. 157, 56 S. Ct. 391, 80 L. Ed. 555 (S. Ct., 1936), viz:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

See also *Wiborg* v. *U. S.*, 163 U.S. 632, 16 S. Ct. 1127, 41 L. Ed. 289 (S. Ct., 1896).

It has been said that error is prejudicial unless the reviewing court can say, with fair assurance, that the jury's judgement was not swayed thereby. *Blackwell* v. *U. S.*, 244 F. 2d 423, *certiorari denied*, 355 U.S. 838, 78 S. Ct. 49, 2 L. Ed. 2d 50 (C.A. 8th, 1957), and that error cannot be disregarded on the basis of a mere conjecture that the jury did not hear what was said or draw from it a possible inference unfavorable to the defense. *Stewart* v. *U. S.*, 366 U.S. 1, 81 S. Ct. 941, 6 L. Ed. 2d 84 (S. Ct., 1961). Even the fact that there was sufficient competent evidence from which a jury could have found a defendant guilty is not decisive. *Kotteakos* v. *U. S.*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (S. Ct., 1946). See also *Bumper* v. *State of North Carolina*, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (S. Ct., 1968). An accused must not only be guilty of the offense of which he is charged and convicted but he must be tried and convicted according to proper legal procedures and standards; and it is no answer to the application of erroneous standards of law that the evidence is sufficient to support a verdict reached in accordance with the proper standards of law.

Wilson v. *U. S.*, 250 F. 2d 312 (C.A. 9th, 1957). Nor is the fact that the appellate court believes the defendant to be guilty enough to disregard the error as harmless. *Weiler* v. *U. S.*, 323 U.S. 606, 65 S. Ct. 548, 89 L. Ed. 495, 156 A.L.R. 496 (S. Ct., 1945).

Indeed, if error is sufficiently serious, there must be reversal even though the appellate court is "without doubt" that the defendant is guilty. *Bollenbach* v. *U. S.*, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350 (S. Ct., 1946); *Meeks* v. *U. S.*, 163 F. 2d 598, 11 Alaska 378 (C.A. 9th, 1947). Nor can it be presumed that any cure to the error here presented was effected by the general instructions afforded by the trial court that the summary exhibit was to be considered by the jury in its deliberation as a summary of evidence admitted at trial. In *Krulewitch* v. *U. S.*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (S. Ct., 1949), Mr. Justice Jackson observed that the "naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Similarly, the Supreme Court in *Bruton* v. *U. S.*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (S. Ct., 1968) said:

> ". . . instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

Even before the *Bruton* pronouncement by the Supreme Court, appellate courts reversed, despite curative instruc-

tions from the trial judge, where the error was so prejudicial that the appellate court could not be sure that the jury was not influenced by it, despite the instruction. *U. S.* v. *Bozza,* 365 F. 2d 206 (C.A. 2d, 1966); *U. S.* v. *Clarke,* 343 F. 2d 90 (C.A. 3d, 1965); *McMillian* v. *U. S.,* 363 F. 2d 165 (C.A. 5th, 1966); *U. S.* v. *Gordon,* 253 F. 2d 177 (C.A. 7th, 1958). As the court said in *Odom* v. *U. S.,* 377 F. 2d 853 (C.A. 5th, 1967):

> "The attempt to sanitize testimony by admonition may sometimes suceed, but its success will very often depend upon how virulent and diseased testimony was. . ."

Although the cases give the distinct impression that "plain error" is a concept appellate courts find impossible to define, save that they know it when they see it, *Jacobellis* v. *State of Ohio,* 378 U.S. 184, 197, 84 S. Ct. 1676, 1683, 12 L. Ed. 2d 793, 803 (S. Ct. 1964), there is ample justification in the prior decisions of this Court, and in the decisions of various of the courts of appeal to substantiate the clear conclusion that admission of the type of evidence complained of here was in fact plain error.

As pointed out in *U. S.* v. *O'Connor,* 237 F. 2d 466 (C.A. 2d, 1956) at 475, the Supreme Court has long recognized that the trial court is under a duty to scrutinize charts, summaries, schedules, etc., before they can be admitted into evidence, to insure that they fairly represent and summarize the evidence on which they are based. See *Costello* v. *U. S.,* 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (S. Ct. 1956). The Fifth Circuit has held hat in a prosecution for income tax evasion, the admission of government's exhibits which were computations of evidence of government's witnesses, where there were omissions, interpretations and discrepancies between the record and the ex-

hibit, was prejudicial error. *Steele* v. *U. S.*, 222 F. 2d 628 (C.A. 5th, 1955). *Fleminster* v. *U. S.*, 260 F. 2d 513 (C.A. 5th, 1958), was another Fifth Circuit income tax evasion case involving the wrongful use of summary schedules, in which the court struck down the government's contention that substantial accuracy is sufficient to meet the requirements for a summary. In addition, in *Fleminster*, the court held that it was prejudicial for the jury to be confronted with the wrongful schedules not only as respects the count to which they referred, but likewise as to other counts against the defendant being tried concurrently therewith. In *United States* v. *Altruda*, 224 F. 2d 935 (C.A. 2d, 1955), another income tax evasion case, the Second Circuit held that it was reversible error to admit in evidence the government's analysis of net worth increase and computation of unreported income where it did not conform to the government's evidence. *United States* v. *Kiamie*, 258 F. 2d 924 (C.A. 2d, 1958), was another Second Circuit tax evasion case involving the offer of summary schedules. In that case, the summary was offered by the defendant, and because it did not conform to the evidence actually received at trial, was rejected by the trial court, and its ruling was upheld by the Court of Appeals. Even the Tenth Circuit itself has recognized that "When such a proposed exhibit contains evidence not otherwise in the record, it loses its identity as a summary and is not admissible." See *Oertle* v. *United States*, 370 F. 2d 719 (C.A. 10th, 1966) at 728.

A concluding reference of even more importance than the individual remedy afforded petitioner or any defendant by the so-called "plain error" rule is aptly supplied by *Wright, Federal Practice and Procedure*: Criminal Sec. 856, in referring to its importance to all individuals, including the courts, at page 374:

> "Clearly a part of the purpose of the plain error rule is to protect the defendant. If a serious injustice was done him, it should be remedied. . . But this does not exhaust the purpose of the rule. Instead the court is to act if there were errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings. *U. S.* v. *Atkinson,* 1936, 80 L. Ed. 555. It is important that justice be done but it is also important that justice seem to be done. It is not a miscarriage of justice to convict a guilty man but if he is convicted in a way inconsistent with the fairness and integrity of judicial proceedings, then the courts should invoke the plain error rule in order to protect their own public reputation."

Petitioner respectfully submits that for the preservation of fairness, integrity and the public reputation of our judicial proceedings, as well as for other reasons heretofore stated, the Tenth Circuit ought properly to have reversed petitioner's convictions under both coun' herein pursuant to its power so to do derived from 18 U.S.C., Federal Rule of Criminal Procedure, Rule 52 (b); and that its failure to do so is in conflict with the prior decisions of this Court and of various of the courts of appeal as to the proper interpretation of 18 U.S.C., Federal Rules of Criminal Procedure, Rule 52 (b), and the duty imposed upon the courts by said Rule; and that its failure so to do constitutes such a departure from the accepted and usual course of judicial proceedings, and a sanction of such a departure by the trial court, as to call for the exercise of this Court's power of supervision.

These conflicts and abuses justify the grant of certiorari to review the decision below.

CONCLUSION

For the additional reasons stated, a writ of certiorari should issue to review the judgement and opinion of the Tenth Circuit.

Respectfully submitted,

JOSEPH P. JENKINS, P. C.
West Park Center
Estes Park, Colorado 80517
Telephone: (303) 586-2496

WASH H. BROWN
Brotherhood Building
Kansas City, Kansas 66101
Telephone: (913) 321-7100

THOMAS W. TIERNEY
2700 Commerce Tower
Kansas City, Missouri 64105
Telephone: (816) 474-9767

Attorneys for Petitioner